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No. 98-1648

IN THE
Supreme Court of the United States

GUY MITCHELL, *et al.*,

Petitioners,

v.

MARY L. HELMS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

This Court has ruled that the Establishment Clause prohibits

1. direct, non-incidental state aid to the primary educational mission of parochial schools and;
2. state aid that is sectarian or reasonably divertable to sectarian use.

Using federal Chapter 2 funds during the 1980s, state officials gave educational materials to parochial schools, much of which were primarily for the use, and under the control, of sectarian school personnel, such as various projectors, cassette recorders, projection screens, maps and globes. The aid also included core educational items like computers and library books screened for sectarian content only by title. The state undertook pre-announced inspections of the materials at most every three years, and the public school board did likewise once a year. Did this aid violate the Establishment Clause?

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STATEMENT OF THE CASE

From the early 1980s to the close of the record in this case in 1989, the Jefferson Parish Public School System ("JPPSS") used federal Chapter 2 funds to provide direct financial benefits to pervasively sectarian schools. Minimal, non-effective "safeguards" were employed to prevent the diversion of the aid to sectarian school uses.

Plaintiffs below, respondents in this action, are local, state, and federal taxpayers who object to the use of tax-derived funds to aid these sectarian enterprises. Plaintiff Marie Schneider, a life-long, committed member of the Roman Catholic Church[1] objects to the government providing benefits to her parish school. She has seen the chilling effect such entangling government aid has on the religious mission of schools run by her church.[2]

In 1990, the trial court entered summary judgment in favor of plaintiffs, ruling that Chapter 2, as applied in Jefferson Parish, violated the Establishment Clause. In 1994, after a change of judges, the trial court reversed the summary judgment. Last year, the Fifth Circuit Court of Appeals re-instated the original summary judgment victory. Intervenors appealed that decision to this Court.

1. The Nature of the Chapter 2 Program

Chapter 2[3] consolidated several federal aid programs into a single "block grant" to the states.[4] Chapter 2 provides

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[1] Mrs. Schneider has been a member of Christ the King Parish Church for about 36 years. With six of her children having attended several different Jefferson Parish Catholic run schools, she understands the mission of sectarian schools. *Trial Transcript*, 4/12/90 at 5-6.

[2] *Id.* at 5-6, 19-20, 22-23.

[3] Previously 20 U.S.C. § 3811 *et seq.*

[4] On April 28, 1988, Congress reauthorized Chapter 2. On October 20, 1994, Congress enacted the Improving America's Schools Act of 1994, Publ. L. 103-382, 108 Stat. 3518. The former Chapter 2 is now

"loans" of library books, instructional material and equipment to schools—public, private and parochial. The federal funds are provided in block grant form to State Educational Agencies ("SEAs") and Local Educational Agencies ("LEAs") (typically school districts), which then purchase the materials, based upon requests from schools, and distribute it to the public, private and parochial schools. The aid includes "library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials . . . which are part of an overall education reform program."[5] This broad range of materials includes instructional equipment such as televisions, video cameras and overhead projectors.[6]

2. Chapter 2 Aid Supplied to the Parochial Schools of Jefferson Parish

The first trial judge found[7] that the funds allocated to nonpublic schools under Chapter 2 for 1985 averaged $5,064 per school.[8] Much of the Chapter 2 equipment provided in Jefferson Parish is for the primary use of teaching staff. The Chapter 2 equipment ordered by the parochial schools shows that much of that equipment is not the type ordinarily provided for individual student use,[9] but as the first trial court

designated "Subchapter VI—Innovative Education Program Strategies" and is codified at 20 U.S.C. §§ 7301-7373. However, to be consistent with the trial court's ruling, petitioners' brief, and ease of reference, respondents will refer to the program as "Chapter 2."

[5] 20 U.S.C. § 7351(b)(2).

[6] S.J. Vol. II, Lewis Dep. at 22-24, 28.

[7] None of the first trial judge's factual findings cited in this section were overruled or reversed by the second trial judge.

[8] Pet. App. 140a. This was in addition to the average of $11,595 for each private school given under the Louisiana statute comparable to Chapter 2. Pet. App. 101a.

[9] Pet. App. 140a, 148a; J.A. 262a-278a.

judge found, included "slide projectors, movie projectors, overhead projectors, television sets, tape recorders, projection screens, maps, globes, filmstrips, cassettes."[10] The Chapter 2 equipment also included computers and software[11] that contained no limitations or "locking" mechanism that would prevent the computers from being used for sectarian purposes.[12] Another major use of Chapter 2 aid was to purchase library books and materials.[13]

3. Chapter 2 Programs and Safeguards

The Chapter 2 program was overseen by two layers of government programs, the state level SEAs and the

[10] J.A. 264a-265a. Other Louisiana school districts also provide much Chapter 2 aid primarily for general school and teacher use.[10] This is reflected in several exhibits that were attached to Plaintiffs' Memorandum in Reply to Defendants' and Intervenors' Answer to Plaintiffs' Motion for Summary Judgment. Evangeline Parish School Board provided Sacred Heart Elementary School with tables and chairs for use by kindergarten classes and "a duplicating machine" to "allow teachers to prepare lessons requiring duplication." Ex. 23 (nonpublic needs assessment). East Baton Rouge Parish provided a transparency maker, wall screens, cart for science lab (nonpublic equipment), projector tables, computer projector, overhead projectors, IBM Quick Card, typewriter carts, wall screens, projector tables, transparency maker, and carts for science labs. Ex. 26. St. Martin Parish purchased carts to take Chapter 2 equipment to classrooms, a magazine rack, a teaching microscope, and an opaque projector. Ex. 27 (nonpublic equipment). Tangipahoa Parish furnished nonpublic schools with a thermal copier/ditto machine for use by the "instructional staff." Ex. 30 (narrative). Aboyelles Parish furnished nonpublic schools with a video table, electric sharpener, typewriter stand, news rack, and a video table, (Ex. 31 (nonpublic schools), as well as cameras to "reduce the cost of hiring a photographer" to take pictures of student activities, a portable public address system "to facilitate large group presenters, i.e. PTA meetings and student assemblies," a television stand, a display rack "to store/display periodicals and paperback novels" and "a portable board for small group presentations." Ex. 36 (Appendix).

[11] J.A. 265a.

[12] *Id.* at 118a, 163a-165a.

[13] *Id.* at 56a, 126a, 280a-284a.

county/parish level LEAs, in this case the latter being the Jefferson Parish school board.

(1) State Chapter 2 Operations and Safeguards

The state encourages LEAs to obtain assurances from nonpublic schools that they will not use the Chapter 2 items supplied for sectarian purposes.[14] The state inspector testified that an assurance given by a nonpublic school is only a statement of good intent and that the state had not attempted to enforce such assurances.[15]

While the state requires school boards (LEAs) to conduct monitoring visits at least once a year, the state receives no reports concerning those monitoring visits.[16] When the state reviews the LEAs' monitoring process, it only ascertains the LEAs have a schedule and check the criteria used.[17] In 1985, the state found in monitoring LEAs that "a system to monitor nonpublic schools was often not in operation and therefore the LEA did not always know: (a) what was purchased or (b) how it was utilized."[18] The state also found that 24.3 percent of LEAs failed to comply with the requirement that all Chapter 2 equipment and materials be permanently marked as such.[19]

The state inspector also testified that he would not expect an LEA to be able to determine on a monitoring visit whether educational equipment had been used for sectarian purposes.[20] While the inspector agreed that only *unannounced* visits would be helpful in making this

[14] J.A. 121a. S.J. Vol. I, Lewis Dep. at 102-103.
[15] *Id.* at 180.
[16] *Id.* at 105-106.
[17] *Id.* at 152.
[18] J.A. 111a.
[19] *Id.* at 113a.
[20] *Id.* at 96a, 118a.

determination, no unannounced visits are made at either the state or local level in Jefferson Parish.[21]

Further, the state does nothing to ascertain if the materials, equipment, books, or whatever else is purchased with Chapter 2 funds and supplied to nonpublic schools, have reduced the amount of money the nonpublic schools have budgeted for library and educational equipment.[22] The monitoring forms include the question: "Are the services, materials, equipment, or other benefits provided to nonpublic schools secular, neutral and non-ideological?" However, the state inspector admitted that there was no way, through monitoring, that one could determine whether educational equipment, such as computers, has been diverted for sectarian use.[23]

(2) Jefferson Parish Chapter 2 Operations and Safeguards

Ruth Woodward, the Chapter 2 coordinator for Jefferson Parish, testified she was "responsible for distribution of funds to those schools for the purpose of instructional materials, equipment and supplies."[24] After Jefferson Parish receives the Chapter 2 allocation from the state, the nonpublic schools themselves decide what equipment and books they want, and the nonpublic school then orders those items from the suggested vendors.[25]

Once the orders are received, requisitions are attached and forwarded to the school district purchasing department, where they are merely checked against the requisition, labeled, and distributed to the schools.[26] The items themselves are

[21] *Id.* at 152a.
[22] *Id.* at 145a-146a.
[23] S.J. Vol. II, Lewis Dep. at 44-45; *see* Lewis Dep. Ex. 28 at 22 ¶ 11.
[24] J.A. 121a; S.J. Vol. II, Woodward Dep. at 17.
[25] *Id.* at 131.
[26] *Id.* at 137.

sometimes shipped by the vendor directly to the school.[27] In either case, the materials are not checked for ideological content or divertability.

Although Chapter 2 materials are officially "loaned" by the public school district to the nonpublic schools, the public school district provided no maintenance or repair. The public school system viewed this as the nonpublic school's responsibility.[28] And once the items were turned over to the schools, the school district never received any of the items back with the exception of 191 books found to be sectarian.[29]

Computers furnished to nonpublic schools by the school district could be used for a variety of purposes, including the printing of church bulletins.[30] Woodward testified she did nothing to monitor computer use.[31] Woodward, like Lewis the state inspector, acknowledged there was no way she could have known whether educational equipment was used to teach religion.[32]

According to Woodward, school board inspectors went on-site to monitor each of the nonpublic schools once a year, spending a mere 45 minutes to two hours at each visit. The inspectors' visits were pre-announced, and letters were sent ahead of their visits to the private school indicating that Chapter 2 items should be available for viewing. When Woodward inspected, she met only with the principal and the school's Chapter 2 contact person, often the librarian, and made a selective check of materials and equipment that had been purchased with Chapter 2 funds.[33] In doing this, she

[27] *Id.* at 138.
[28] *Id.* at 139-140.
[29] *Id.* at 142.
[30] *Id.* at 148.
[31] *Id.* at 149.
[32] *Id.* at 92.
[33] *Id.* at 96-97.

checked to see if the items were labeled and their use recorded, but she admitted that there was no way for her to know whether the equipment was really used for proper purposes.[34]

Woodward never inquired about the content of the classes that had used the educational equipment. And in her orientation sessions, there was no discussion concerning what might be sectarian and what might be secular.[35] Woodward never made *unscheduled* on-site monitoring visits and normally advised of her monitoring visits one month in advance.[36] Jefferson Parish had devised no process to ensure that personnel other than Chapter 2 contact persons were informed that Chapter 2 materials were to be used only for secular, nonideological purposes.[37] Woodward did not require the items furnished be secured against unauthorized use.[38]

The only request for the purchase of instructional equipment that was ever turned down while Woodward was the coordinator was wiring for St. Martin School. Although she had judged it not to be a violation "because the wiring . . . could be removed from the facility," this was subsequently rejected by the state. In fact, Woodward herself never rejected any equipment request.[39]

4. The Character of the Parochial Schools Provided With Chapter 2 Aid in Jefferson Parish

The trial court found that, of the 46 nonpublic schools participating in the Jefferson Parish Chapter 2 program, 41

[34] *Id.* at 98, 100-101.
[35] *Id.* 149-151.
[36] *Id.* at 118, 120.
[37] *Id.* at 126-27.
[38] *Id.* at 123-24.
[39] *Id.* at 135-136.

were religiously-affiliated and 34 of them were Catholic.[40] The religiously-affiliated schools received 96 percent of the Chapter 2 funds allocated for private schools in Jefferson Parish.[41]

The majority of the participating schools required attendance at daily religion classes,[42] had religious symbols in their classrooms, held sacramental preparation classes, required attendance at Mass, and provided for religious extracurricular activities.[43] The Archdiocese had a policy to prefer Catholics in the hiring of teachers, and several Catholic parochial schools gave preference to Catholic students in admissions and the setting of tuition rates.[44]

The Archdiocese's curriculum objectives state: "[t]he distinctive purpose of the Catholic schools is to proclaim the Gospel message, to build community, and to educate. Within the school community the teachers, priests, parents, and students experience together what it means to live a life of prayer, community and personal responsibility and freedom reflective of the Gospel values . . . ."[45]

Howard Jenkins, Superintendent for the Archdiocese's schools, testified that Catholic beliefs are taught in religion classes, and they are part of the school curriculum, but that religion is a part of secular classes as well.[46] Alvin Murphy, the President of Archbishop Chapelle, testified:

[40] Pet. App. 143a-144a.
[41] Because the vast majority of the parochial schools in this case were Catholic, the record is most fully developed with respect to that church's schools.
[42] Some schools will excuse non-Catholics; some will not.
[43] Pet. App. 144a-145a.
[44] Pet. App. 144a.
[45] S.J. Vol. V, Jenkins Dep. Ex. 25 at 38 ¶ 6110.
[46] *Id.* at 112-113.

> Our teachers, whether they are religion teachers or not, are certainly instructed that when issues come up in the classroom that have a religious, moral, or value concept, that their answers be consistent with the teachings of the Catholic Church . . . so that there can be opportunities in other classes other than religion where discussions of religion could take place. . . .[47]

At Archbishop Chapelle, all students were required to take religion classes all four years they attended.[48] President Murphy testified that "[t]he whole focus of [the school] was to teach the children what the teachings of the Catholic Church are . . . . At Archbishop Chapelle, no child may be excused from the religion or theology classes."[49]

The Archdiocese policy on parochial school teacher qualifications is as follows:

> **[t]eachers** employed in the **Archdiocesan** schools should preferably be Catholics who have a knowledge of and commitment to the Catholic faith and to Christian living. In hiring non-Catholics, care should be taken that they also have a knowledge of the Catholic faith and a commitment to Christian living.[50]

Our Lady of Divine Providence School faculty handbook requires a prayer table in each classroom upon which "either the Old and New Testament [is] displayed, along with only other religious articles deemed appropriate." "It is the responsibility of the religion teachers to see that these tables are erected and [to] secure the articles for display."[51] Further,

[47] S.J. Vol. V, Murphy Dep. at 27.
[48] *Id.* at 15.
[49] *Id.* at 16-17.
[50] S.J. Vol. V, Jenkins Dep. Ex. at 17 ¶ 2110.01 (emphasis in original).
[51] S.J. Vol. V, Jenkins Dep. Ex. at 32 ¶ 41.

at that school, every teacher is to attend his or her grade level family Mass.[52]

Trial court judge Frederick J.R. Heebe found that "virtually every handbook of the Archdiocesan schools reveals the pervasive religious character of the schools."[53] He held that in the parochial schools of Jefferson Parish, "education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious beliefs is consistently maintained."[54] He then concluded that in Jefferson Parish "the majority of the [private] schools receiving Chapter 2 aid are pervasively sectarian."[55] This finding was not challenged by the subsequent trial court judge.

SUMMARY OF THE ARGUMENT

The intervenors propose to make *Agostini v. Felton* the linchpin both of this case and of their "neutrality" theory of the Establishment Clause. The intervenors' reliance on *Agostini* is misplaced as there were fundamental differences in the character and delivery of the indirect Chapter 1 aid in

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[52] *Id.* at ¶ 51.

[53] *Pet. App.* 147a. This finding was supported by the student handbook for St. Christopher School, which advises that "[i]n conformity with the basic principle of Catholic education, St. Christopher School places religious instruction and religious worship at the center of its program of studies and activities, and strives to develop a total environment which will enable its students to develop as full Christians." S.J. Vol. V, Jenkins Dep. Ex. 9 at 1. Similarly, Christ the King's handbook advises that "[m]oral and spiritual training is an integral part of all educational classes at our school." S.J. Vol. V, Jenkins Dep. Ex. 10.

[54] Pet. App. at 145a.

[55] *Id.* at 272a. This Court's presumption that primary and secondary church affiliated schools are "pervasively sectarian" guards these religious schools from invasive inspections by the state. *See*, Donald Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 Sup. Ct. Rev. 147, 191.

Agostini, from that of the direct Chapter 2 aid in this case. Further, the Chapter 2 program's safeguards as applied in Jefferson Parish fall far short of what the Court required in *Agostini*. This is shown by the 191 religious books purchased with Chapter 2 funds over a three-year period that were only returned after the filing of this lawsuit. Many other lapses will remain unknown, as Chapter 2 inspectors visited parochial schools only once a year on pre-announced visits that lasted less than three hours. The inspectors themselves testified that it was impossible for them to know if the Chapter 2 equipment they inspected had been used for sectarian purposes. The whole Chapter 2 program was well outside both the spirit and intent of the *Agostini* decision.

Plaintiffs argue that to decide this case, it will only be necessary to show that *Meek* and *Wolman* applied the two continuing, major concerns of the Court's state aid and religious school cases: the first being that state aid may not support the educational mission of parochial schools; the second, that permissible state aid benefiting students, and not schools, may not itself be sectarian or divertable to sectarian use. In applying these guidelines, the Court has assumed, as articulated in *Lemon v. Kurtzman,*[56] that parochial school teachers will do what they are hired to do—teach sectarian values even in otherwise "secular" courses. The practical effect of this rule is that state instructional aid primarily used by teachers cannot be placed under the control of parochial school teachers. Since *Zobrest v. Catalina Foothills Sch. Dist.,*[57] and *Agostini v. Felton,*[58] the Court no longer applies this view of sectarian inculcation to *public* school teachers on parochial school premises. But in *Agostini,* the Court refused

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[56] 403 U.S. 602 (1971).

[57] 509 U.S. 1 (1993).

[58] 521 U.S. 203 (1997).

to overturn this longstanding view with regard to *parochial* school teachers.

In applying the guideline against displacing parochial school functions, the Court has observed that state aid cannot supplant, but can only supplement, parochial school educational functions. This was highlighted in *Zobrest* where the Court ruled that the state provision of a sign language interpreter to a student did not displace a function of the parochial school.[59] The rule against supplanting a parochial school's function was also an important part of the *Agostini* decision.

Plaintiffs show that Chapter 2 aid, as delivered to Jefferson Parish parochial schools, goes primarily for the use of the school and teachers. Much of the aid is technical, presentation type equipment for use by teachers, and none of it is primarily for the continuing use of individual students. Also, the aid generally supplants the core function of the parochial schools, as it is used in classes of the core curriculum, probably even religion classes. It is also used to fund core educational programs required by the state, such as library services and computer classes.

Finally, plaintiffs point out that the recently revised safeguards that the Secretary of Education would like to make a central part of this case are not part of this case. The Court should not issue an advisory opinion on safeguards that were not developed factually below.

ARGUMENT

Introduction

It may be impossible to reconcile this Court's Establishment Clause jurisprudence with some "Grand

[59] *Zobrest*, 509 U.S. at 12.

Unified Theory" of church/state separation.[60] But for more than a half century this Court has consistently relied on a few basic, interrelated principles when dealing with state aid to church schools—such as whether the aid subsidizes religious indoctrination, whether it favors or disfavors any religion, and whether it supplants a core function of the religious school. But the parent and teacher intervenors, petitioners[61] in this case, would like to focus on merely one of these principles, that of state neutrality toward religion, and turn that into *the* theory of the Establishment Clause.

But to credit the intervenors' view, one must accept that this Court reversed its views on core Establishment Clause issues not once, but twice—and in a space of only five years.[62] Intervenors allege that in the 1975 case of *Meek v. Pittinger*[63] the Court unveiled a new, more restrictive, Establishment Clause analysis. Then five years later in the 1980 decision of *Committee for Pub. Educ. v. Regan,*[64] the Court allegedly abandoned this new approach.

In the intervenors' tale, the Court never openly acknowledged these abrupt and dramatic changes. Rather,

[60] *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 852 (1995) (O'Connor, J., concurring).

[61] This case actually involved three sets of petitioners: plaintiffs filed a petition on the issue of on-site special education (No. 98-1568) and the state of Louisiana filed a petition on both Chapter 2 and the Louisiana Library Book and School Supply Program (No. 98-1671). Both these petitions are still pending. The third petition was filed by intervenor parents and teachers on the issue of federal Chapter 2 aid, and that is the petition that has been granted by this Court. To avoid confusion, the titles of the parties used in the trial court will be used in this brief: so the petitioners in this portion of the case will be referred to as "intervenors" and the respondents herein will be denoted as the "plaintiffs."

[62] *Pet. Br.* 17-18.

[63] 421 U.S. 349 (1975).

[64] 444 U.S. 646 (1980).

they claim, in *Meek* and then in *Wolman v. Walter,*[65] the Court embarked without explanation on "a different approach" and then in *Regan* "rendered judgments inconsistent" with this new, apparently short-lived method.[66] Adding mystery to their saga is that the alleged change between *Wolman* and *Regan* occurred with *no* change in the make-up of the Supreme Court.[67]

The intervenors' reading of this Court's church/state cases raises more questions than it answers and leaves the reader with a palpable sense of jurisprudential whiplash. The story overlooks both earlier[68] and later cases[69] that used largely the same reasoning to achieve similar results as those in *Meek* and *Wolman*. Plaintiffs believe that a more nuanced and fact specific view of the same cases reveals them to be part of the largely coherent growth and interplay of a number of Establishment Clause values. To focus on only one principle is a mistake. As one justice has noted: "[n]eutrality, in both form and effect, is one hallmark of the Establishment Clause," but "there exists another axiom in the history and precedent of the Establishment Clause. Public funds may not be used to endorse the religious message."[70]

The Court is also asked, by the U.S. Secretary of Education, to abandon its view that parochial school teachers

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[65] 433 U.S. 229 (1977).

[66] *Pet. Br.* 17-18.

[67] Indeed, over the entire five year period of this jurisprudential double-flip, there was a single addition to the Court, Justice Stevens, who did not cast a deciding vote in any of the three cases.

[68] *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Public Funds for Pub. Sch. of New Jersey v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

[69] *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985).

[70] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 846-847 (1995) (O'Connor, J., concurring).

will convey sectarian instruction as a part of their otherwise "secular" classes. In short, the Secretary asks the Court to deny that religious school teachers will, or should, teach religiously[71]—a denial that runs contrary to multiple decisions of this Court and to the philosophy of parochial school systems in general and of those in Jefferson Parish in particular.[72]

The Secretary would replace this vital principle with the rule that parochial school teachers will not, and indeed should not, teach sectarian values in their "secular" courses, at least in classes receiving state aid.[73] Ostensibly a less sweeping change of church/state law than that proposed by intervenors, the Secretary's argument would profoundly threaten the religiosity of parochial schools by causing the state to unintentionally "bribe" them into extensive secularization.

1. Under the Establishment Clause, state officials are prohibited from giving direct, non-incidental aid to the primary educational mission of parochial schools.

The use of Chapter 2 funds by Jefferson Parish parochial schools to purchase instructional materials, including projectors, recorders, audio-visual ("A/V") equipment and library books violates historic Establishment Clause values. The aid in this case is most obviously proscribed by three decisions of this Court, *Public Funds for Pub. Sch. v. Marburger,*[74] *Meek v. Pittenger*[75] and *Wolman v. Walter.*[76] Contrary to petitioners' claims, these cases do not stand in

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[71] *Sec. Ed. Br.* 34 n.16, 38, 41, 44-45.

[72] *See supra* p. 8-9.

[73] *Sec. Ed. Br.* 34 n.16, 38, 41, 44-45.

[74] 358 F. Supp. 29 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974).

[75] 421 U.S. 349 (1975).

[76] 433 U.S. 229 (1977).

stark isolation. Rather, as the following chronological analysis shows, they are the immediate application of constitutional principles of great longevity and stature.

A. The No Direct Subsidy principle has firm historical foundations that show the insufficiency of intervenors' neutrality argument—*Cochran*, *Everson* and *Allen*.

A central principle of the Establishment Clause is the ban against using "proceeds of the general assessments in support of religion," a practice which "lie[s] at the core of the prohibition against religious funding . . . . "[77] This ban has a lineage that stretches back to the struggles over disestablishment that led to the creation of the Establishment Clause. Thomas Jefferson, in his 1786 *Virginia Act for Establishing Religious Freedom*,[78] decreed that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." James Madison made the same objection in his 1785 *Memorial and Remonstrance*, written in support of Jefferson's Act. There, Madison wrote that it was a denial of equal treatment under the laws to force those "whose minds have not yet yielded to the evidence which has convinced us" to support religions in which they did not believe.[79] Madison also noted the corrupting and enervating effect that state aid has on religion—producing "superstition, bigotry and persecution." [80] Neither of these evils is solved by evenhandedly funding religious and secular. And both objections are at odds with intervenors' claim that the

[77] *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 851 (1995) (O'Connor, J., concurring).
[78] Julian Boyd, ed., *Papers of Thomas Jefferson*, Vol. II, p. 546 (1950).
[79] Madison, *Memorial and Remonstrance* ¶ 4, 330 U.S. at 66.
[80] *Id.* ¶ 7 at 67.

Founders, including Madison,[81] never intended the Establishment Clause to be more than a rule of neutrality.

These concerns, the unfairness of forcing unbelievers to support an alien religion, as well as the corruption accompanying state-aid intrusion into church affairs, became widely appreciated in the early years of our developing Republic. As outlined in *Lemon v Kurtzman*,[82] it was these concerns, combined with the political divisiveness caused by multiple religious groups seeking funding for their own schools, that caused all but half a dozen states to pass laws prohibiting state aid to sectarian schools.

This ban against direct, non-incidental government subsidy of religious education runs like a thread through this Court's educational aid decisions. Beginning with *Cochran v. Louisiana*[83] and *Everson v. Board of Educ.*,[84] this Court has consistently made two points: (1) that state aid cannot constitutionally displace or directly and non-incidentally further or support the educational and religious mission of parochial schools;[85] and (2), that state aid for use by students or their parents, or that only incidentally benefits parochial schools, cannot itself be sectarian or reasonably divertable to sectarian use.

The *Cochran* Court noted that the state textbook aid at issue went to the children themselves and that the religious schools were not "relieved of a single obligation" by the aid.

[81] *Pet. Br.* 33.
[82] 403 U.S. 602, 627-632, 645-648 (1971) (Douglas, J., concurring; Brennan, J., concurring).
[83] 281 U.S. 370, 375 (1930).
[84] 330 U.S. 1 (1947).
[85] Throughout this brief, the term "parochial schools" will be used to refer to elementary, primary and secondary schools run by religious organizations. These are schools that this Court assumes to be "pervasively sectarian," as opposed to only being "religiously affiliated."

Further, the supplied books were non-sectarian and were not reasonably "adapted to religious instruction."[86] These two points are also found in the 1947 case of *Everson v. Board of Educ.*[87] where, in upholding public busing for parochial school children, the Court noted that the "State contributes no money to the schools. It does not support them."[88] Likewise, the aid was in no way sectarian or divertable to sectarian use, but rather the state did "no more than provide a general program to help parents get their children . . . to and from accredited schools."[89] Similarly, in *Board of Educ. v. Allen,*[90] a textbook case challenged under the Establishment Clause, the Court observed that the aid was "furnished at the request of the pupil."[91] No "funds or books" were "furnished to the parochial schools, and the financial benefit" was to "parents and children, not to schools."[92] Moreover, the Court noted that only the loan of secular books was allowed under the statute, and there was no evidence in the record that these books had been used "by the parochial schools to teach religion."[93]

The reasoning in these cases contradicts intervenors' claim that the decisions were driven by the neutrality of aid principle.[94] Neutrality was no doubt necessary, but in no way sufficient, for these aid programs to be constitutional. In none of these foundational cases was neutrality dispositive. Each of the decisions dealt with the neutrality of aid only cursorily, spending much more time on the substance of whether the

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[86] *Cochran*, 281 U.S. at 375.
[87] 330 U.S. 1 (1947).
[88] *Id.* at 18.
[89] *Id.*
[90] 392 U.S. 236 (1968).
[91] *Id.* at 243-244.
[92] *Id.*
[93] *Id.* at 248.
[94] *Pet. Br.* 17.

state aid directly benefited the religious mission of the sectarian schools.[95] In fact, in *Everson* the Court chose to set aside the question of whether the state busing aid, which excluded private students going to for-profit private schools, which are less frequently religious than not-for-profit private schools, was truly neutral.[96] Indeed, *Everson* explicitly rejected intervenors' notion that pure neutrality between religions constitutionally sanctifies a state aid program. The Establishment Clause, the Court ruled, "means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another."[97]

These cases compel the conclusion that intervenors' argument—that their proposed neutrality analysis represents the "constitutional principles of that era [1930s to 1970s]"[98]—cannot be accepted. As several justices of this Court have agreed, "history neither contradicts nor warrants reconsideration of the settled principle that the Establishment Clause forbids support for religion in general no less than support for one religion or some."[99]

B. The No Direct Subsidy principle acknowledges that parochial school teachers teach sectarian values—*Lemon* and *Nyquist*.

As more sectarian school aid programs came before the Court, it continued to refine its "no direct subsidy of religion" principle in light of the mission of parochial schools and the role of teachers hired by those schools. In *Lemon v.*

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[95] *Cochran*, 281 U.S. at 375; *Everson*, 330 U.S. at 18; *Allen*, 392 U.S. at 243.
[96] *Everson*, 330 U.S. at 4-5.
[97] *Id.* at 15 (emphasis added).
[98] *Pet. Br.* 17.
[99] *Lee v. Weisman*, 505 U.S. 577, 616 (1992) (Souter, J., Stevens, J., and O'Connor, J., concurring).

Kurtzman,[100] the Court struck down state aid in the form of salary supplements and reimbursements for parochial school teachers. The Court ruled that "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs,"[101] as "a textbook's content is ascertainable, but a teacher's handling of a subject is not."[102] This distinction led to the Court's key observation about parochial school teachers that relates to the present case:

> *[A] dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . .* With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.[103]

This proposition was not based on parochial school teachers having "bad faith or any conscious design to evade" the First Amendment.[104] Rather, it was a recognition of the conflict created by placing devout religious teachers on parochial campuses with students of their own faith and asking them to act in a religiously neutral manner. The *Lemon* Court recognized the truth, applicable to the present case, that to monitor the classroom of a parochial school teacher for sectarian instruction will inevitably require comprehensive, and excessively intrusive, state monitoring.[105]

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[100] 403 U.S. 602 (1971).
[101] *Id.* at 619.
[102] *Id.* at 617.
[103] *Id.* at 618-619 (emphasis added).
[104] *Id.* at 618.
[105] *Id.* at 619.

These principles were next applied in *Committee for Pub. Educ. & Religious Liberty v. Nyquist,*[106] where the Court struck down maintenance and repair grants to parochial schools and tuition reimbursements and tax deductions available to parents of parochial school children. It held that the aid subsidized "directly the religious activities of sectarian . . . schools"[107] as the aid, even though non-ideological itself, was not "so separate and so indisputably marked off from the religious function" of the schools' missions as to be constitutional.[108]

Justice Powell, writing for the majority, observed: "*no attempt is made to restrict payments . . . to the upkeep of [secular] facilities . . . nor do we think it possible within the context of these religion-oriented institutions.*"[109] *Nyquist* thus recognized that direct state aid, even in the form of inherently "secular" objects like bricks and mortar, for use by parochial school personnel, would inevitably and unconstitutionally advance religion. *Nyquist* cannot be reconciled with intervenors' claim that as long as the aid itself is "neutral in content," it may be used in furthering religious instruction as long as "[a]ny religious message or content . . . originate[s] in the genuinely independent decisions of private parties, not that of government officials."[110]

We are not alone in criticizing intervenors' position. Even the Secretary of Education points out the failings of this argument, noting that money itself is secular, and under the intervenors' theory could be given directly to religious schools for any and all uses, including the salaries of

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[106] 413 U.S. 756 (1973).
[107] *Id.* at 774.
[108] *Id.* at 782.
[109] *Id.* at 774 (emphasis added).
[110] *Pet. Br.* 23.

teachers.[111] The intervenors' reasoning also contradicts every Establishment Clause case dealing with aid to parochial schools.

C. The No Direct Subsidy principle prohibits state instructional aid for the primary use of parochial school teachers—*Marburger, Meek, Wolman* and *Regan.*

The *Marburger,*[112] *Meek,*[113] and *Wolman*[114] trio of cases addressed the form of state aid at issue in the present case—educational equipment and instructional materials for primary use of parochial school teachers. These cases are the ones most directly challenged as obsolete by intervenors. But a careful reading of these cases shows that in the same way intervenors under-read the "no direct aid" strength of the pre-*Nyquist* cases, so they over-read the same element in the immediate post-*Nyquist* decisions. A more fact specific reading of these cases shows that they applied principles that are of continuing vitality.

In *Public Funds for Pub. Sch. v. Marburger,*[115] this Court affirmed and adopted the decision of a three-judge federal panel which denied state educational aid to parochial schools. The aid included projectors, televisions, record players, recorders, radios, cameras, copiers, typewriters and other "secular, non-ideological" materials.[116] The decision noted that, as in the present case, while the aid was "inherently neutral," most of the items could be "used with equal facility in the teaching of religious studies" as well as secular

[111] *Br. Sec. Ed.* 32-33.
[112] *Public Funds for Pub. Sch. of New Jersey v. Marburger*, 358 F. Supp. 29 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974).
[113] *Meek v. Pittenger*, 421 U.S. 349 (1975).
[114] *Wolman v. Walter*, 433 U.S. 229 (1977).
[115] 358 F. Supp. 29 (D. N.J. 1973), *aff'd*, 417 U.S. 961 (1974).
[116] *Id.* at 34, 38.

topics.[117] Consistent with the *Lemon/Nyquist* insight that parochial school personnel are presumed to inculcate religion even in "secular" courses or projects, the *Marburger* decision placed what amounted to a categorical ban on instructional aid primarily for the use of parochial school teachers. The Court realized that the monitoring of such usage would inevitably involve excessive entanglement.[118]

Likewise in *Meek,*[119] the Court struck down the loan of secular instructional materials, such as "maps, charts, and laboratory equipment."[120] The Court explained that secular aid to the educational mission of a parochial school "necessarily results in aid to the sectarian school enterprise as a whole."[121] This observation was understood by the *Meek* Court itself to be limited to aid for use by parochial school personnel, as in the very same decision the Court also re-affirmed the *Allen* decision and allowed secular, state approved textbooks to go to parochial school children. Textbooks have an educational function and role, but the Court held that the benefit was to "parents and children, not to the nonpublic schools."[122] In this, the Court implicitly recognized a distinction between aiding the education of the students and aiding the educational mission of parochial schools, with the latter having an inherent religious bent.

Recent decisions of the Court have made explicit that state aid to the education of parochial school children may be possible where the aid is controlled and used by public

[117] *Id.* at 38-39.
[118] *Id.* at 36.
[119] 421 U.S. 349 (1975).
[120] *Id.* at 365.
[121] *Id.* at 364, 366.
[122] *Id.* at 361.

employees.[123] But its application to circumstances such as those in the Jefferson Parish Chapter 2 program, where the educational aid is under the control of parochial school employees and can further the educational mission of the sectarian school, remains unchanged.

Wolman v. Walter[124] applied the *Meek* rule to a broader range of equipment used by parochial schools, including projectors, tape recorders, record players, and maps,[125] again the same kind of aid at issue in the present case. But *Wolman* is notable for the aid that it approved. Along with textbooks, the Court authorized state standardized testing and state scoring of those tests for parochial school children. The tests were created and used by the state to ascertain that private school students were meeting state instructional standards. As such, the tests and their scoring were primarily for the educational purposes of the state. Thus, the Court ruled that the tests did not aid the primary educational mission of the sectarian schools as they did not, and could not, support "the religious role of the schools."[126] Based on similar reasoning, the Court also approved speech, hearing and other diagnostic services, as well as off-campus therapeutic and remedial services.[127]

Meek and *Wolman* were no radical revision of Establishment Clause doctrine.[128] Rather, the Court applied

[123] *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).
[124] 433 U.S. 229 (1977).
[125] *Id.* at 249.
[126] *Id.* at 240, 250.
[127] *Id.* at 255.
[128] And contrary to intervenors' claims, neither the *Meek* nor *Wolman* decisions were driven by equality concerns. In both cases, the state aid given to private school children matched material given to public school children. Indeed, if the equality issue had been a deciding factor, all the aid programs in *Meek* and *Wolman* would have been struck down, as they

the *Cochran/Everson/Allen* doctrine that state aid must benefit the student and not the religious school enterprise and that the aid itself must not be sectarian or divertable to sectarian use. It also applied the *Lemon/Nyquist* insight that parochial school teachers will teach religiously even in secular courses. As Justice Powell summarized in his *Wolman* concurrence, state aid might legitimately be "helpful" in parochial students' education process "so long as the aid is incapable of diversion to religious uses, and so long as the materials are lent to the individual students or their parents and not to the sectarian institutions."[129] But that legitimate aid did not, and cannot in this present case, include instructional materials for use by parochial school teachers.

A full view of the aid allowed in *Wolman* defeats intervenors' claim[130] that in *Committee for Pub. Educ. and Religious Liberty v. Regan,*[131] this Court began to chart a new Establishment Clause course. In *Regan*, the Court dealt with forms of aid, standardized testing and grading as well as recordkeeping, that *it had already ruled acceptable* in *Wolman* as aid that did not go to the educational mission of parochial schools. The only new twist in *Regan* was that the private school teachers were paid by the state to grade the state tests. But it was found that the grading process "afforded no control to the school over the outcome of any of the tests."[132] Thus, the tasks involved, grading of state created tests and recordkeeping, were not part of the "teaching process" and could not be used to foster an "ideological outlook."[133] So while aid in *Regan* did in some

all directed aid only to nonpublic schools. The fact that they were not shows that intervenors' "equality" explanation of these cases is incorrect.
[129] *Wolman*, 433 U.S. at 263.
[130] *Pet. Br.* 18.
[131] 444 U.S. 646 (1980).
[132] *Id.* at 655.
[133] *Id.* at 657.

sense go to parochial school teachers, the aid was not meaningfully under their control in an educational sense, as they acted merely as conduits of state prepared test answers. The state did not aid the teachers' classroom instruction to pursue the educational mission of the parochial school. So *Regan* itself is entirely explicable in the *Meek/Wolman* framework which disallowed aid to the educational mission of the parochial school itself, as opposed to the educational goals of the state.

D. The Court's most recent cases agree that parochial school teachers will teach religiously and that aid which supplants the core function of parochial schools is improper—*Aguilar*, *Ball*, *Zobrest* and *Agostini*.

What *Agostini* changed can only be understood by looking carefully at the cases it overruled. In *Aguilar v. Felton*[134] and *School Dist. of Grand Rapids v. Ball*,[135] the Court expanded the view of the inevitability of sectarian instruction by teachers on parochial school campuses to include *public* school teachers. Both cases banned various sorts of state funded remedial and community education programs offered on parochial school campuses and administered largely by public school teachers, with the exception of the community education program in *Ball*, which was taught by parochial school teachers.[136]

The Court concluded that public teachers on parochial school campuses might "subtly (or overtly) conform their instruction" to the sectarian environment and "religious doctrine will become intertwined with [their] secular

[134] 473 U.S. 402 (1985), *rev'd*, *Agostini v. Felton*, 521 U.S. 203 (1997).
[135] 473 U.S. 373 (1985), *rev'd in part*, *Agostini v. Felton*, 521 U.S. 203 (1997).
[136] *Aguilar*, 473 U.S. at 406; *Ball*, 473 U.S. at 377.

instruction."[137] The assumed behavior of public employees on parochial school premises was the key to both cases, as most of the aid programs were constitutional if supplied in a location away from the parochial school campuses.[138] Both *Ball* and *Aguilar* were decided by 5 to 4 votes, which reflected the disagreement in the Court over the characterization of public school teachers as "eager inculcators of religious dogma requiring . . . ongoing inspection."[139]

Notably for the present case, however, there was much less disagreement over *Ball's* application of the *Lemon* observation that parochial school teachers will do what they are paid to do—teach religiously. In *Ball*, only two justices dissented from striking down the parochial-teacher-led community education program. Seven justices implicitly agreed with the proposition expressed by Justice O'Connor in concurrence that:

> [W]hen full-time *parochial school teachers* receive public funds to teach secular courses to their *parochial school students* under *parochial school supervision* . . . the program has the perceived and actual effect of advancing the religious aims of the church-related schools . . . .[as] *the teachers are accustomed to bring religion to play in everything they teach.*[140]

This proposition is *not* based on a belief that parochial school teachers may operate in bad faith. Rather, it is a simple recognition that a committed religious person, teaching in a school of his or her faith, will have an

[137] *Ball*, 473 U.S. at 388.
[138] *Aguilar*, 473 U.S. at 426 (O'Connor, J., dissenting).
[139] *Ball*, 473 U.S. at 401 (Rehnquist, J., dissenting).
[140] *Ball*, 473 U.S. at 399-400 (O'Connor, J., concurring) (emphasis added).

understandable difficulty in being religiously neutral.[141] Indeed, as the Archdiocese policies and parochial school handbooks of Jefferson Parish show, parochial school teachers are *hired* to be religious partisans.[142] As this Court has succinctly stated, "the conflict of functions inheres in the situation."[143]

Agostini v. Felton[144] did not change this Establishment Clause rule relating to parochial teachers, and thus that case does not represent the radical change urged by intervenors. In *Agostini* the type of state aid itself was not the issue. In *Aguilar* the Court had only prohibited otherwise acceptable aid because it was delivered in an unacceptable manner: that is, by public school teachers *on* parochial school premises. What changed in *Agostini* was the Court's earlier willingness to believe that public school teachers would do what they were *not* hired to do, which is teach religion. Left intact was the mirror image of this, that parochial school teachers will do what they *are* hired to do, which is teach religion.

The *Meek/Ball* presumption that "all government aid that directly assists the educational function of religious schools is invalid," was qualified in *Agostini* to reflect the secular, non-divertable aid allowed in *Witters*[145] and *Zobrest*[146]— incidental, indirect aid based on the independent choice of third parties or indirect aid that did not relieve parochial schools of costs they otherwise would have borne.[147]

The revision of this latter presumption, a revision recited mantra-like by petitioners and their supporting amici, can

[141] *Lemon*, 403 U.S. at 618.
[142] *See supra* p. 8-9.
[143] *Lemon*, 403 U.S. at 617.
[144] 521 U.S. 203 (1997).
[145] 474 U.S. 481 (1986).
[146] 509 U.S. 1 (1993).
[147] *Agostini*, 521 U.S. at 226.

only be understood in the context of what the Court did in *Agostini*. The Court allowed "*supplementary*" secular aid to be delivered by "*government employees*" on parochial campuses directly to students in a program containing "*safeguards*" against sectarian instruction.[148] The Court's holding hearkens back to the concerns expressed in *Meek, Wolman* and *Ball*, that aid not be given directly for the instructional use and control of parochial school employees. It also embodies the *Zobrest v. Catalina Foothills Sch. Dist.*[149] concern that state aid only supplement and not supplant pre-existing, core functions of the parochial schools.

The "no supplant" rule is one answer to a concern the Court raised in *Ball*, where it said that the state might unconstitutionally "subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects."[150] In *Zobrest*, where it allowed a state employee to serve as a deaf language interpreter for a student at a parochial school, the Court noted that the aid did not relieve the school from "an expense that it otherwise would have assumed in educating its students."[151] Favorably citing to both *Meek* and *Ball*, the Court re-affirmed the principle, directly applicable to the present case, that direct state aid that relieved parochial schools of an "otherwise necessary cost of performing their educational function" was unconstitutional.[152]

The intervenors' contention that the supplant/supplement rule is purely statutory and has no constitutional basis[153] is puzzling in light of *Zobrest*,, a constitutional decision and

[148] *Id.* at 234-235.
[149] 509 U.S. 1 (1993).
[150] *Ball*, 473 U.S. at 397.
[151] *Zobrest*, 509 U.S. at 12.
[152] *Id.*
[153] *Pet. Br.* 26, n.16.

dangerous in light of their claim that secular aid can be used, by private actors, for ideological purposes.[154] The combination of these views would allow for massive state aid, with the only limit being that of overtly religious materials, to be used in any and all aspects of the parochial school enterprise. It would allow the state to place public school employees as teachers of all secular subjects on parochial school campuses. This would fulfill the warning made in *Ball* and *Zobrest* that state aid must not displace core educational functions, because otherwise "the public schools [will] gradually. . .take over the entire secular curriculum of the religious school."[155] The Court's decision in *Agostini*[156] re-affirmed the "no supplant" standard, [157] noting that the state aid went "directly to the eligible students" and not to the parochial schools[158] and that the aid had not been shown to supplant educational functions of the parochial schools.[159]

Indeed, the Secretary himself view the "no supplant" rule as of continuing importance, citing to it throughout his brief. [160] Disagreeing with intervenors, the Secretary concedes that, even after *Agostini,* the results in *Meek* and *Wolman* should probably not change as the aid in those cases might still be "constitutionally questionable" under the "no supplant" rule affirmed in *Agostini.*[161]

Intervenors misread *Agostini* and attempt to apply its three-part "effect" test without recognizing that an important part of this test is whether the aid supplements the educational

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[154] *Id.* at 23, 29.
[155] *Ball*, 473 U.S. at 396; *Zobrest*, 509 U.S. at 12.
[156] 521 U.S. 203 (1997).
[157] *Id.* at 210, 226, 228-230, 234-235.
[158] *Id.* at 228-229.
[159] *Id.* at 210, 226, 228-230, 234-235.
[160] *Id.* at 31, 36, 38, 42-43.
[161] *Sec. Ed. Br.* 43.

function of parochial schools.[162] Rather, intervenors read the bar against governmental indoctrination as allowing for secular state aid to be used in core curriculum areas that may advance sectarian purposes.[163] But in explaining why the Chapter 1 program would not advance "religion through indoctrination,"[164] the Court explained that "as in *Zobrest*, [Chapter 1] services are by law supplemental."[165]

The gap between the aid in *Agostini* and that involved in the present case is huge. *Agostini* dealt with remedial education programs where the state paid *public teachers* to teach students *secular, remedial* subjects in private schoolrooms stripped of sectarian symbols. In the present case, the aid goes directly to *parochial school teachers* to teach *core educational subjects*, in *sectarian* schoolrooms frequently decorated with religious symbols.[166]

E. This Court should continue to hold that parochial school teachers can, and should, be expected to teach religiously.

In light of the above precedent, the issue of whether the direct state aid in this case is acceptable revolves around one simple question: Should religious school teachers be expected to teach religiously in all their classes? The Court's historical answer to this question, in *Lemon* and *Meek* and *Ball,* and explicitly left unchanged by *Agostini*, is "yes." And, because of this, it has ruled that state educational aid under the use and control of parochial school teachers will unconstitutionally further the religious educational mission of parochial schools.

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[162] *Agostini*, 521 U.S. at 228-230, 234-235.
[163] *Pet. Br.* 23, 29.
[164] *Agostini*, 521 U.S. at 226.
[165] *Id.* at 228.
[166] J.A. 124a.

The intervenors' answer to this question also is "yes," but that the Court should change its view of the Establishment Clause and accept a pure neutrality view which would allow teachers to use state aid for sectarian purposes as long as the ideological impulse originates with the teacher and not the state. Such a view would require a wholesale abandonment of the major part of this Court's Establishment Clause jurisprudence. Intervenors acknowledge this when they call for the Court to jettison the "pervasively sectarian" constitutional category of religious institutions.[167] But would these groups be so eager to give up the pervasively sectarian status if the Jefferson Parish parochial schools lost the privileges that go with that status—the ability to discriminate based on religion in hiring, firing, student admissions and student and faculty discipline?[168]

The Secretary of Education's answer to the question of whether parochial school teachers will, or should, invariably teach religious values is "no." And thus, he would allow, state aid can go to the "secular" educational function of parochial schools as long as it is not used to assist in sectarian

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[167] *Pet. Br.* 40; *See also* briefs of *amici curiae, Christ. Leg. Soc. Br.* 16-17; *Becket Fund Br.* 20-23.

[168] *See, Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987). The cry of certain religious groups to be treated *equally* with secular groups is really a request to be treated *preferentially;* these religious groups seek the benefits extended to secular entities without taking on their burdens of non-discrimination and equal access. But this Court has said that one cannot have it both ways. In *Norwood v. Harrison*, the Court recognized that state aid to "any sectarian school which restricted entry on racial or religious grounds would, to that extent, be unconstitutional." 413 U.S. 455, 465 n.7 (1973), *quoting*, *Lemon* 403 U.S. 602, 671 n.2 (1971) (White, J., dissenting). In *Lemon*, Justice White also noted that requiring Bible or religion class attendance, as many Jefferson Parish parochial schools do, would also disqualify a private school from public aid.

instruction.[169] In practical terms, this would require a religious "cleansing" of classes where government equipment was operated. Although the Secretary claims that not every "classroom discussion of religion" will forbid the use of Chapter 2 equipment in that room, he limits such discussion to the non-sectarian, non-proselytizing exchanges that are allowed in public schools.[170] And while the Secretary acknowledges that parochial schoolteachers will pursue religious topics *outside* the classroom, he believes that *inside* the state-aided classroom those same teachers can only teach in a secular fashion.[171]

The Secretary's answer posits a "religion free zone" at the heart of the parochial school system. This is what plaintiff Marie Schneider expressed as her great fear—that state aid will be a tool that will secularize the teaching of most subjects in parochial schools.[172] This is no speculative fear, but has already happened to church affiliated colleges which receive state aid to be used in only purely secular courses.[173]

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[169] *Sec. Ed. Br.* 45.

[170] *Id.* at 34-35, n.16.

[171] *Id.* at 45.

[172] *Trial Trans.* 4/12/90 at 5-6, 19-20, 22-23.

[173] A Catholic leader has written about the disastrous effects that state aid to secular programs has on the religious components of Catholic colleges:

> Recently I was invited to speak to a group of students majoring in theology at one of the Catholic universities in the mid-west. I was taken to a nondescript, broken-down building which was . . . totally separated from the rest of the campus. That is where religion is because all of the other buildings are in one way or another funded with federal money and there can be no religion in there. The university authorities admitted that this was not a happy situation, *but it was the price to be paid for the substantial amount of federal funds that had been poured into university buildings.*

W.E. McManus, *Felix Culpa—Report from the Ad Hoc Committee on School Aid*, 20 Cath. Law. 347, 353-54 (Autumn 1974) (emphasis added).

The intervenors themselves oppose the consequences of the Secretary's view as devastating to parochial school life. In their description of the aid programs in *Lemon,* which required the same kind of classroom secularity in state-aided classes as the Secretary's proposal, intervenors describe such an approach as amounting to "a bribe to the school to secularize its own offerings."[174] The consequences of the Secretary's argument would be to place "sectarian schools . . . in the position of trying to disprove any religious content in various classroom materials"[175] where Chapter 2 aid was used.

The plaintiffs in this case are no enemies of religious education. On the contrary, a concern for the spiritual health of religious schools was a driving concern in bringing this lawsuit. Plaintiff Marie Schneider has testified to her deep concern at the spiritual compromise required by the state aid safeguards in the school system of her own church. She is strongly opposed to the bifurcation of the religious and secular demanded by the Secretary as the price to gain state

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This trend toward secularization and the marginalization of religion at historically religious colleges is not limited to Catholic institutions. This troubling phenomenon exists across the denominational spectrum and is the subject of a book by James Tunstead Burtchaell entitled *The Dying of the Light: The Disengagement of Colleges and Universities from their Christian Churches* (Eerdmans 1998). Burtchaell documents the fading of religious mission and spiritual direction at colleges historically run by a number of denominations, including Congregationalists, Presbyterians, Methodists, Baptists, Lutherans and Evangelicals. Among the factors involved in this devolution of faith, Burtchaell fingers the growing role played by the state in college affairs. "The regional accrediting associations, the alumni, and the *government* replaced the church as the primary authority to whom the college would give an accounting of its stewardship." *Id.* at 837 (emphasis added).

[174] *Pet. Br.* 28.

[175] *New York v. Cathedral Academy*, 434 U.S. 125, 132-133 (1977).

aid.[176] Mrs. Schneider, on behalf of countless other parents and grandparents who share her belief in the importance of faith in education, asks this Court to let religious school teachers teach religiously, without the restriction inevitably brought by direct state aid.

2. The aid in this case is not primarily for the use of individual students, but supplants the core educational mission of parochial schools and is divertable to sectarian use.

In summary, if state aid is directed primarily for the individual use of the student and does not supplant the core educational mission of the sectarian school, then the aid may be constitutional if it is distributed without regard to religious affiliation, is non-sectarian and not reasonably divertable to sectarian use. But the Chapter 2 aid at issue in the present case does not meet this formula and is thus unconstitutional.

Aid that is not considered to go to core educational functions, and is thus supplemental, includes aid that goes to a student for his or her own use, such as textbooks,[177] busing,[178] lunches,[179] health services,[180] deaf translation services.[181] It also includes state run and taught remedial education aimed at children with handicaps or special needs,[182] or aid with no sectarian use that helps schools fulfill primarily state educational goals, such as mandated standardized testing and reporting requirements.[183]

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[176] *Trial Trans.* 4/12/90 at 5-6, 19-20, 22-23.

[177] *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

[178] *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

[179] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[180] *Wolman v. Walters*, 433 U.S. 229 (1977).

[181] *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

[182] *Agostini v. Felton*, 521 U.S. 203 (1997).

[183] *Wolman*, 433 U.S. at 238-41; *Regan*, 444 U.S. at 656-657.

The aid in the present case does not fit into any of these categories, but rather relates to the traditional, core instructional mission of religious schools. This was recognized in *Marburger, Meek* and *Wolman*. The factual record indicates that the Chapter 2 aid was often directed primarily to teachers rather than students and was not supplementary, but was used to further the core educational mission of the sectarian school.

A. Chapter 2 equipment was used primarily by parochial school teachers in carrying out the core educational mission of their schools.

State funded audio-visual ("A/V") and instructional equipment was used by Jefferson Parish parochial school teachers in a variety of classes, including those containing sectarian instruction. At least one teacher from St. Christopher School indicated that she used the Chapter 2 A/V materials "in all subjects."[184] Archbishop Chappelle High School, prepared a list of classes using A/V equipment, "much of which . . . was purchased with Federal funds,"[185] which indicates that the theology classes used the equipment more than any other department but one, for three out of four years.[186]

No affidavit was filed denying the use of Chapter 2 A/V by the theology department. Further, the state Chapter 2 monitor testified that there was no way to tell, in the yearly scheduled inspection visit, if A/V equipment had been used in religion classes or for religious purposes in secular classes.[187] Such a showing raises an inference, sufficient to defeat intervenors' request for summary judgment, that Chapter 2

[184] J.A. 108a.
[185] J.A. 205a.
[186] J.A. 206a.
[187] J.A. 118a, 139a-140a.

A/V equipment was used by the theology department on repeated occasions. As the comparative use chart lumps together both Chapter 2 and non-Chapter 2 equipment, it is impossible for either litigants or monitors to actually assess compliance with Chapter 2 guidelines.[188]

Intervenors' claim that there is no proof that Chapter 2 equipment was used in religion classes[189] merely highlights the inadequacy of the state's monitoring system—the philosophy of which seemed to be "see no evil, hear no evil, speak no evil."[190] But the intervenors should not be able to use the inadequacy of the record-keeping system to defeat the Court's view that parochial school teachers on parochial school campuses will use instructional equipment for sectarian purposes. As the Court has said, "the State must be certain . . . that subsidized teachers do not inculcate religion."[191] Rather, the state must show "with *a high degree of certainty* that the aid does not present any *appreciable risk* of being used to aid the transmission of religious views."[192] This standard places on the intervenors the burden of producing credible records affirmatively indicating that state aid placed in the hands of parochial school personnel has not been used for sectarian purposes. This they have not done.

In any event, there is evidence in the record that Chapter 2 aid was diverted to the general administrative use of a church-operated elementary or secondary school. At St. Angela

[188] In our brief, on pages 1-2, and 22-23, to the Fifth Circuit Court of Appeals, plaintiffs' objection to the trial court's finding that the monitoring controls in affect were adequate under *Walker* was preserved.
[189] *Pet. Br.* 10.
[190] The state relies heavily on the self-policing efforts of the Chapter 2 schools, which do not have any real incentive, or natural whistleblowers, to report religious use of Chapter 2 equipment when it happens.
[191] *Lemon*, 403 U.S. at 619.
[192] *Regan*, 444 U.S. at 653.

School in Jefferson Parish a Chapter 2 computer was used in the library to keep track of the books in the library.[193] The Chapter 2 computers are not "locked" into a purely secular program, but can be used with any software for any purpose.[194] Indeed, the inspector for the school board testified that inspectors would have no way of knowing if church bulletins were printed on the computer.[195]

Further, computers are an integral and central part of school educational programs. In Louisiana, the law requires that all schools offer courses in computer literacy and computer science.[196] Thus, Chapter 2 computers are at a high risk of supplanting parochial school programs.[197] Other Chapter 2 equipment (such as overhead projectors, equipment carts, chairs and tables, copier machines and typewriter stands) provided by Louisiana parishes to parochial schools and described in the Statement of the Case is open to a variety of school uses, including religious and administrative.[198]

Chapter 2 equipment supplied to parochial schools in Louisiana includes material that supplants resources schools would otherwise have to buy. This is not surprising in light of the testimony of inspector Woodward, who believed that the

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[193] Attachment to Plaintiffs' Motion for Partial Summary Judgment Vol. 2, Welsch Dep. at 38-39.

[194] J.A. 118a, 163a-165a.

[195] J.A. 164a. This stands in contrast to the computers in the Ninth Circuit decision of *Walker v. San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995), *reh'g and reh'g en banc denied*, 62 F.3d 300 (9th Cir. 1995), where Chapter 2 supplied computers were "locked" into purely secular, reference kinds of usage.

[196] *Louisiana Handbook for School Administrators, Nonpublic Bulletin 741*, 6.105.02 (1997).

[197] See the *amicus curiae* brief prepared by the New York State School Boards Association and the National School Boards Association discussing the central role of computers in modern education.

[198] *See infra* 3-4.

"supplement and not supplant" rule prohibited the *replacement* of equipment or materials that had been originally purchased with school money. This view of the rule does not account for the expansion or growth in the core educational function of religious schools. For example, Woodward agreed that a new typewriter could not be purchased to replace one that had originally been purchased with school funds. But she believed that the requirement would not be violated if it were shown that the typewriter was for a new program, apparently without regard for whether the program was an expansion of a core educational function.[199]

Much Chapter 2 aid was directed primarily for teacher instructional use as opposed to individual student use—such as overhead and movie projecters, tape recorders, projection screens, filmstrips and televisions.[200] As Justice Powell noted in *Wolman*, to claim that these materials are "furnished for the use of individual students and at their request" is "transparent fiction."[201] Rather, the "loan of these items is indistinguishable from forbidden 'direct aid' to the sectarian institution itself . . . ."[202] If the Court were to approve the above aid, there would no longer be meaningful limits on what aid the state might supply to parochial schools, short of overtly religious materials.

B. The system used to purchase and screen Chapter 2 library books violated both the supplementary aid and non-divertability standards.

Chapter 2 funds were used to buy a large number of overtly religious books for Jefferson Parish parochial schools. The Secretary of Education contends that the Jefferson Parish

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[199] *Id.* at 152-56.

[200] *See infra* p. 3.

[201] *Wolman*, 433 U.S. at 264 (Powell, J., concurring).

[202] *Id.*

"program has been administered in accordance with the requirements set forth in *Agostini*."[203] Discounting the fact that Jefferson Parish found it necessary to recall 191 state purchased religious books,[204] the Secretary argues that "the recall underscores that JPPSS' review was undertaken seriously and carried out diligently."[205]

Intervenors claim that "respondents have identified only isolated events that purport to show that program safeguards have broken down."[206] Intervenors argue that "*[o]ne such event*, in which religious books were purchased in violation of Chapter 2 statutory restrictions, *occurred several years* before the operative complaint was filed and *long before the guidelines* that govern the program were in place."[207]

But both the Secretary's and intervenors' claims are contradicted by the record. First, the selection of the recalled books was not the result of "one" event. The record shows that the 191 religious books were ordered, not by one school at one time, but by a significant portion of half of the 45 nonpublic schools over a three-year period.[208] Some of the religious books were on the shelves for two or three years, as this review of book titles took place shortly after receipt of

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[203] *Sec. Ed. Br.* 47.
[204] *Id.* at 48, n.20.
[205] *Id.*
[206] *Pet. Br.* 9.
[207] *Id.* (Emphasis added). It is not clear what intervenors mean when they claim that the purchase of the religious books occurred "long before the guidelines that govern the program were in place." There certainly were guidelines in place in 1982 to 1985, and these were not changed by the discovery of the religious books in 1985. In an as applied challenge, which this case is, the fact that new guidelines may now be in place is irrelevant. What is before this Court is what occurred in Jefferson Parish during the time reflected in the record, from about 1982 to 1989.
[208] J.A. 80a-81a, 131a-133a.

the April 26, 1985, monitoring report from the state.[209] But the religious books were not actually recalled and returned to the state until mid-December, 1985, nearly six months later *and*, as it happened, eight or nine days *after* the filing of respondents' lawsuit on December 2, 1985.[210]

It is no surprise that after this lawsuit was filed, special care would have been taken to ensure the furnishing of only secular library books. But even this special care did not solve the problem of Chapter 2 funds being used to buy religious books. In 1986, for example, St. Lawrence the Martyr School ordered and received *A Child's Book of Prayers*.[211] Additional proof of this was inadvertently supplied in 1995 by the state, well after the 1989 close of discovery, when the Louisiana Attorney General filed various documents with the court in support of a post-judgment motion. This document showed that in 1992, St. Agnes School ordered and received the books *Patrick, Saint of Ireland*; *We Celebrate Easter*; *David and Goliath*; and *Nativity*.[212]

We do not know what other religious books were purchased with Chapter 2 funds after 1989, as those records are not available to us. Neither is the answer really known by state employees, as the system used to screen book purchases is demonstrably inadequate. Ruth Woodward, in charge of the Chapter 2 program for Jefferson Parish, testified there was no pre-approved list supplied to parochial schools from which to select books.[213] Rather, books were chosen by nonpublic school personnel using private publishing house catalogs, which contained religious titles.[214] Books at times were

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[209] J.A. 130a-131a.
[210] J.A. 80a-81a.
[211] J.A. 84a.
[212] J.A. 280a, 281a, 284a.
[213] J.A. 126a; *see also* Cannon's testimony at 56a.
[214] J.A. 56a, 126a, 280a-284a.

chosen by volunteer school workers unfamiliar with Chapter 2 guidelines.[215]

Once the books were chosen, the titles, cost and publisher of the selected books were sent to the school district.[216] When ordering the books for nonpublic schools, Woodward looked only at the title, and never the book's content.[217] This title review was the only screening done by the school district, even after the recall of the 191 books in 1985. The book monitor merely deletes suspicious sounding titles.[218] And then the books are sent by the private booksellers directly to the nonpublic school.

But monitoring only by title can be underinclusive, overinclusive, and is certainly inadequate to ensure compliance with the Establishment Clause. Leonard Fine, Assistant Superintendent of Schools for the Archdiocese of New Orleans, scoffed at the use of a title search to ensure compliance with Chapter 2 requirements. He revealed one of the 191 recalled books was *The Saints Go Marching In*, a book about the New Orleans Saints football team.[219] Another defense witness, Dan Lewis, Director of Louisiana's Bureau of Consolidated Programs, admitted that a title review would *not* ensure Chapter 2 compliance "[b]ecause you can't always judge a book by its cover."[220] He testified that "a title might sound like a sectarian book and might not be a sectarian book."[221] And, of course, the converse is equally true.

There is conflicting evidence in the record as to whether books were reviewed in post-purchase monitoring visits to

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[215] J.A. 58a-59a, 62a.
[216] J.A. 56a-57a, 280a-284a.
[217] J.A. 128a-29a, 135a.
[218] J.A. 134a, 138a.
[219] J.A. 63a.
[220] J.A. 97a.
[221] *Id.*

the parochial schools. State employees, during their monitoring visits, claimed to spend at most five to ten minutes sampling book contents.[222] But even this sparse estimate is contradicted by defense witness, Ruth Woodward, who said on monitoring visits she checked only to see if books were "appropriately labeled with a Chapter 2 stamp" and to see "how many people" were using the books.[223] She made no mention of reviewing the book's content. To the contrary, she testified she never reviewed the content of a Chapter 2 book.[224]

But, even when the federal aid was used for the purchase of secular books, the aid violated the "supplementary aid only" principle. Running a library is a core educational function of any school. Louisiana secondary schools are required by state law to have a library with "10 books per pupil or 2,500 separate titles, whichever is greater."[225] But the Assistant Superintendent of Schools for the Archdiocese of New Orleans testified that Chapter 2 funds were "used first" by Catholic school libraries, and *then* if school monies remained, further books would be purchased.[226] In many cases, "there were no funds available," and the parochial schools relied entirely on Chapter 2 funds to "furnish their libraries."[227] This would seem the very definition of

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[222] J.A. 99a.
[223] J.A. 142a-43a.
[224] J.A. 128a-29a, 134a-35a.
[225] *Standards and Guidelines for Library Media Programs in Louisiana Schools, Bulletin 1134* p 15 (1997). Elementary schools have the same requirement, except the minimum total number is 2,000. *Id.* at 13. Similar guidelines existed in 1985, with the exception that no total minimum number of books were required. *Also see, Louisiana Handbook for School Administrators, Nonpublic Bulletin 741*, 6.071.11-15, (1997), which requires that library expenditures be at least $2 per student and there be 10 books per student.
[226] J.A. 63a.
[227] *Id.*

supplanting, rather than supplementing, a core school program.

3. *Agostini* does not require reversal of the decision below as the aid and safeguards in this case differ from those found in that decision.

Intervenors argue that the result in *Agostini* compels the Court to find the aid in this case constitutional.[228] The Secretary, at odds with the intervenors' view of the law, understands that *Agostini* "involved a situation distinct from this one," where aid is dispensed by *parochial* rather than *public* school teachers.[229] Nevertheless, the Secretary argues that "the JPPSS program has been administered in accordance with the requirements set forth in *Agostini*."[230] The intervenors missaply *Agostini*, and the Secretary misunderstands the "safeguards" that were employed by the Jefferson Parish Public School System.

Contrary to intervenors' claims, the Court in *Agostini* declared that "the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided."[231] The Court continues to assess a state programs "effect" on religion by examining the character of the institutions and the nature of the aid.[232] Such an analysis would be meaningless under intervenors' theory, which makes irrelevant the character of the institutions.

The Court stated that it was not *Agostini*, but *Zobrest*, that changed the law.[233] But *Zobrest*, embracing the conclusion of

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[228] *Pet. Br.* 15.
[229] *Sec. Br.* 26.
[230] *Id.* at 47.
[231] *Agostini*, 521 U.S. at 222.
[232] *Id.* at 232.
[233] *Id.* at 225.

Witters, stated that the "state may not grant aid to a religious school, whether in cash or in kind, where the effect of the aid is that of a direct subsidy to the religious school from the state."[234] As *Agostini* is based on *Zobrest*, it cannot have undermined the no direct state subsidy to religious schools upheld in *Zobrest*.

Intervenors also ignore the crucial distinction between the character of the aid provided under Chapter 1 in *Agostini* and the Chapter 2 aid provided in this case. In *Agostini*, Chapter 1 aid is designed to provide remedial education and instructional services to public and nonpublic school children who reside in low income areas and who need remedial services. But in this case, Chapter 2 is applied to provide continuing allotments of educational services, equipment and materials to schools, public, private and parochial. Eighty-five percent of the funds earmarked for a local educational agency ("LEA") is based upon the number of students in both public and private schools, while only 15 percent goes to LEAs based upon the number of children from low income families.[235]

Chapter 1 provides remedial education benefits through public school teachers directly to qualifying students. Chapter 2, on the other hand, is designed to provide benefits directly to the school for use by parochial school personnel. It is the nonpublic school, not the LEA, that decides what the allocation for their school will be used for.[236]

Likewise, the Secretary fails to properly distinguish between the *Agostini* safeguards and the ineffective "safeguards" employed here. In *Agostini*, *all* Chapter 1[237]

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[234] *Zobrest*, 509 U.S. at 12, *quoting*, *Ball*, 473 U.S. at 394.
[235] Pet. App. 56a.
[236] *Id.* at 89a.
[237] To be consistent we refer to the program considered by the Court in *Agostini* as "Chapter 1," although in *Agostini* the program was referred to as "Title I." Both programs, having their origin in the 1965 Congress,

teachers were given oral and written instructions about avoiding sectarian matters. But in this case, only one Chapter 2 contact person from each school attends the yearly Chapter 2 orientation session, thus excluding most of the teachers who actually use Chapter 2 material.[238] In *Agostini*, public school teachers functioned separately from the sectarian school organization and were accountable only to public school supervisors. But in this case, the parochial teachers and administrators decide what aid will be provided, and those using the aid are all staff of the sectarian school who are required to participate in the religious activities of the school.[239]

In *Agostini*, Chapter 1 services could only supplement services already provided in the sectarian schools. But in this case, Chapter 2 provides items that are necessary for schools to function, such as library materials and computers. In *Agostini*, a publicly employed field supervisor made at least one unannounced visit to Chapter 1 classrooms per month to ensure that only secular subjects were taught and other guidelines were followed. In this case, the school board makes one pre-announced visit per year, and the state inspector visits one or two private schools in one-third of the school districts each year.[240] (To visit all 40 participating parochial schools will take the state inspectors more than a century!)

In *Agostini*, all Chapter 1 teachers were assigned to teach without regard to their religious affiliation or the wishes of the sectarian schools. But in this case, the teachers using Chapter 2 materials are selected by the sectarian schools with

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were enacted as part of the Elementary and Secondary Education Act of 1965.

[238] J.A. 146a, 149a, 154a-155a, 162a-163a.

[239] Pet. App. 89a; J.A. 217a ¶6.

[240] J.A. 182a-183a, 225a-226a.

a preference given to those affiliated with the denomination associated with the school.[241] In *Agostini*, the Chapter 1 equipment and materials can only be used in a mandated secular Chapter 1 program. In this case, the Chapter 2 equipment is used in both core and elective classes.[242] In *Agostini*, religious symbols were barred from Chapter 1 classrooms. But here the items are used within the total sectarian atmosphere of the school, including schools where every classroom has a table with distinctively religious items and symbols.[243]

Factually, both the state and Jefferson Parish inspection programs fell far short of the security provided by the *Agostini* safeguards.[244] Considering that this case involves the use of state aid by *parochial school teachers*, even greater care should have been taken than that found to be sufficient in *Agostini*. This Court should reject the Chapter 2 aid in this case as supplanting parochial school functions and as presenting too high a risk of divertability to sectarian use.

4. Summary judgment cannot be entered on the adequacy of current or future safeguards as they are not a part of this case.

The relevant time period of this as-applied statutory challenge is from the early 1980s to 1989, when discovery closed. As plaintiffs have shown, safeguards in use in Jefferson Parish during this period were woefully inadequate to prevent the use of Chapter 2 materials in sectarian instruction. The Secretary of Education, however, would like to make guidelines passed in *February of 1999* part of the

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[241] J.A. 73a-74a.

[242] J.A. 190a, 205a-208a, 217a.

[243] J.A. 68a, 71a, 75a; S.J. Vol. V, Jenkins Dep. Ex. 32 at ¶ 41.

[244] *See supra* 3-7.

discussion of this case.[245] This brings before the Court material that never was a part of this case below and is a direct request for an advisory opinion on the new guidelines. Since 1793 the Court has been unwilling to issue such legal advice, and it should resist that request now.[246]

Even if the Court believes that the new safeguards, or others that could be created, would make constitutional portions of the aid in this case, the Court should re-affirm the decision below, as these safeguards did not exist in this case. The risks inherent in creating or assessing safeguards in the abstract are heightened by the entanglement concerns raised by the highly sectarian nature of the schools in Jefferson Parish.

Computers and other high-tech equipment pose unique challenges as they are by nature highly divertable and difficult to monitor. The advent of the internet and interchangeable software means that computers can be used for a wide range of sectarian uses without reasonable control. Surely this Court would not want to decide what sort of safeguards would be adequate for this type of equipment without a clear and well defined factual record before it.

Plaintiffs would strongly disfavor a remand of this case, which would protract an already marathon-like legal proceeding. The record in this case is nearly fifteen years stale and particularly unsuited for re-opening. There are other cases that will bring these contemporary issues before the Court far more effectively, and legally, than this one would.

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[245] *Sec. Ed. Br.* 38, 1a-9a.

[246] *See*, Hart & Wechsler, *Federal Courts* (3d Ed. 1988), 65-72, for a copy of the correspondence involved in the Court's 1793 refusal to give President George Washington an advisory opinion, and for a discussion of the history of the prohibition against such opinions.

CONCLUSION

This Court should AFFIRM the judgment below for the reasons set forth above.

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